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No. 97-210-CFX

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

OFFICIAL COMMITTEE OF TORT CLAIMANTS,

Petitioner,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, and CORNING INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT MINNESOTA MINING AND MANUFACTURING COMPANY

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in ruling that it had jurisdiction in mandamus to enforce its mandate by reviewing the decision of the United States District Court for the Eastern District of Michigan, which ignored the Sixth Circuit's mandate to conduct an abstention analysis in strict compliance with the requirements of 28 U.S.C. § 1334.

2. Whether the Sixth Circuit erred in ordering the United States District Court for the Eastern District of Michigan to transfer silicone gel breast implant claims pending against nondebtor codefendants when those claims are "related to" the chapter 11 case of Dow Corning Corporation under 28 U.S.C. § 157(b)(5).

LIST OF PARTIES

In addition to the parties listed in the caption, the following are parties to the proceeding in the Sixth Circuit: Minnesota Mining and Manufacturing Company, Baxter International Incorporated; Baxter Healthcare Corporation; Bristol-Myers Squibb Corporation and Medical Engineering Corporation; Heidi Lindsey; Johnson County, Texas, Plaintiffs; Breast Implant Tort Claimants Represented by O'Quinn, Kerensky, McAninsh & Laminack; Office of the United States Trustee; Mississippi Physicians; MDL Panel; California Plaintiffs' Steering Committee, as *amicus curiae* and Official Committee of Unsecured Creditors, as *amicus curiae*.

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, respondent Minnesota Mining and Manufacturing Company states that it does not have a parent company. Its subsidiaries (other than wholly owned subsidiaries) are Eastern Heights State Bank of St. Paul (Minn.), Sumitomo 3M Limited (Japan), 3M Health Care Limited (Japan), 3M Korea Limited (Korea), and Birla 3M Limited (India).

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Respondent, Minnesota Mining and Manufacturing Company ("3M") respectfully requests that the Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit (the "Petition") seeking review of the Sixth Circuit's decision in *Lindsey v. Dow Chemical Co. (In re Dow Corning Corp.)*, 113 F.3d 565 (6th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3129 (U.S. Aug. 4, 1997) (No. 97-210) (hereinafter, "*Lindsey II*").

OPINIONS BELOW

The opinion of the Sixth Circuit in *Lindsey II* (Tort Comm. Pet. App., 1a-12a),[1] is reported at 113 F.3d 565 (6th Cir. 1997). On May 9, 1997, the Sixth Circuit issued its mandate (Tort Comm. Pet. App., 1a-12a). The opinion of the United States District Court for the Eastern District of Michigan (the "District Court Order"), which was reversed by the Sixth Circuit in *Lindsey II* (Tort Comm. Pet. App., 13a-20a), is unreported.

STATUTORY PROVISIONS INVOLVED

The principal statutory provisions involved are: 28 U.S.C. § 1334(c)(2), which provides:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(d), which provides:

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[1] References to "Tort Comm. Pet. App." are to the Appendix to the Petition.

> Any decision to abstain or not abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. § 157(b)(5), which provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

STATEMENT OF THE CASE

Dow Corning Corporation ("DCC") was the predominant producer of silicone gel breast implants until 1992 when it stopped manufacturing implants. Because thousands of recipients of silicone gel breast implants asserted claims for compensatory and punitive damages in federal and state court actions against DCC, on May 15, 1995, DCC was forced to file for protection under chapter 11 of title 11, United States Code (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Eastern District of Michigan.

On the date DCC commenced its chapter 11 case, over 7,000 implant lawsuits, representing the claims of over 15,000 plaintiffs, had been filed against respondent 3M, which stopped manufacturing breast implants in 1984. Record 265; Boardman Decl. ¶4.[2] DCC has been named as a codefendant with 3M in over 5,000 of those 7,000 lawsuits. Record 265; Boardman Decl. ¶5. In virtually every one of

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[2] "Record ___" refers to the Record filed in connection with the decision below.

those 5,000 cases, plaintiffs asserted claims of joint and several liability against 3M and DCC for the full amount of their asserted damages. Record 265; Boardman Decl. ¶¶7-10. Additionally, in many of the implant cases, the plaintiffs received implants manufactured by DCC as well as implants made by 3M. Record 473; Letter to J. Hood of Aug. 4, 1995.

Thousands of other cases were also filed against Bristol-Myers Squibb Corporation and Medical Engineering Corporation (together "Bristol-Myers"), Baxter International Incorporated and Baxter Healthcare Corporation (together "Baxter"), as well as other defendants, including the 50% shareholders of DCC, The Dow Chemical Company and Corning Incorporated (the "Shareholders," and collectively with 3M, Bristol-Myers, and Baxter, the "Nondebtor Codefendants"). As with the cases against 3M, many of the cases against the other Nondebtor Codefendants also named DCC as a codefendant, asserted joint and several liability, and involved implants from multiple manufacturers.

Background

On June 25, 1992, the Judicial Panel on Multidistrict Litigation (the "MDL Panel") ordered the centralization of pretrial proceedings in all of the thousands of federal breast implant actions that have been filed against DCC and the Nondebtor Codefendants, and transferred the actions to Chief Judge Pointer of the Northern District of Alabama (the "Multidistrict Court"). *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, 793 F. Supp. 1098, 1099-1101 (J.P.M.L. 1992). The MDL Panel found that these actions involve complex common questions of fact and that centralization would best serve the convenience of the parties and witnesses, promote the just and efficient conduct of litigation, avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. *Id.* at 1099-1101.

A proposed class action settlement (the "1994 Settlement") was reached among DCC, the Nondebtor Codefendants, and the plaintiffs' steering committee, and approved by the Multidistrict Court by order dated September 1, 1994. *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, No. CV92-P-10000-S, MDL No. 926, Civ. A. No. CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994). On December 22, 1995, the Multidistrict Court approved a revised version of the 1994 Settlement, which did not include DCC as a settling party. *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926))*, No. CV 94-P-11558-S (N.D. Ala. 1995) (Order No. 27 approving revised settlement program and injunctions).

Proceedings Below

A. *Lindsey I*

As a result of DCC's chapter 11 filing on May 15, 1995, the silicone gel breast implant actions of plaintiffs who had, at that time, opted out of the 1994 Settlement (collectively, the "Implant Actions") were automatically stayed from prosecution against DCC pursuant to 11 U.S.C. § 362(a). The Implant Actions against the Nondebtor Codefendants, however, were not stayed despite the fact that in most cases joint and several liability was asserted against DCC and one or more of the Nondebtor Codefendants.

In June 1995, DCC and the Nondebtor Codefendants filed separate motions pursuant to 28 U.S.C. § 157(b)(5) to transfer to the United States District Court for the Eastern District of Michigan (the "District Court") the claims asserted in pending federal and state court Implant Actions in which DCC was a party (collectively, the "Implant Claims"). By memorandum opinion and order, dated September 12, 1995 (Tort Comm. Pet. App., 49a-76a), the District Court asserted

jurisdiction under 28 U.S.C. § 1334(b) with respect to the Implant Claims pending against DCC and permitted transfer of such claims pursuant to 28 U.S.C. § 157(b)(5). *In re Dow Corning Corp.*, 187 B.R. 919 (E.D. Mich. 1995), *rev'd*, 103 F.3d 129 (6th Cir. 1996). Record 389. The District Court, however, denied the motion to the extent it related to claims against the Shareholders. *Id.* By separate memorandum opinion and order, dated September 12, 1995, the District Court denied all of the Nondebtor Codefendants' § 157(b)(5) transfer motions on the ground that the Implant Claims against the Nondebtor Codefendants were not sufficiently related to the DCC bankruptcy to confer jurisdiction pursuant to 28 U.S.C. § 1334(b). *In re Dow Corning Corp.*, 187 B.R. 934 (E.D. Mich. 1995). Record 388.

Moreover, the District Court did not abstain from adjudicating the Implant Actions against DCC. *In re Dow Corning Corp.*, 187 B.R. at 932. Record 389. Although it refrained from discussing the abstention issue in detail with regard to the actions against the Nondebtor Codefendants, the District Court "incorporated by reference its analysis of the abstention issue in its Memorandum Opinion and Order on the Debtor's Motion to Transfer." *In re Dow Corning Corp.*, 187 B.R. at 938. Record 388.

DCC and the Nondebtor Codefendants appealed the District Court's decisions to the Sixth Circuit. Applying the broad jurisdictional scope of 28 U.S.C. § 1334(b), the Sixth Circuit reversed the District Court's determinations that it lacked subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants and that it did not have the power to transfer those claims pursuant to 28 U.S.C. § 157(b)(5). (Tort Comm. Pet. App., 48a). *Lindsey v. O'Brien, Tanski & Young Healthcare Professionals (In re Dow Corning Corp.)* (hereinafter, "*Lindsey I*"), 86 F.3d 482 (6th Cir. 1996), *cert denied*, 117 S. Ct. 718 (1997). In *Lindsey I*, the Sixth Circuit concluded that a transfer would "further the prompt, fair, and complete resolution of all claims 'related to' bankruptcy pro-

ceedings and harmonize Section 1334(b)'s broad jurisdictional grant with the oft-stated goal of centralizing the administration of a bankruptcy estate." *Id.* at 497. The Sixth Circuit found that because the joint liability claims pending against DCC and the Nondebtor Codefendants give rise to contingent claims for indemnification or contribution among all of the defendants, including DCC, which could ripen into fixed claims, the potential that DCC will be held liable to the Nondebtor Codefendants for indemnification or contribution, or vice versa, "suffices to establish a conceivable impact" on DCC's estate and confer jurisdiction on the District Court. *Id.* at 494.

With respect to the issue of abstention, the Sixth Circuit found that the District Court failed to develop a full record on the issue, and declined to address the issue "in the first instance." Thus, the Sixth Circuit remanded the case to the District Court for further proceedings on the issue of abstention pursuant to 28 U.S.C. § 1334(c). *Lindsey I*, 86 F.3d at 498. In the Sixth Circuit's mandate, the District Court was instructed to decide whether the exception to mandatory abstention contained in 28 U.S.C. § 157(b)(4) applied to the Implant Claims, and if not, whether the factors calling for abstention were met in each action by conducting a case-by case analysis. *Id.* at 497-98.

The Official Committee of Tort Claimants (the "Petitioner") filed a petition for a writ of certiorari to the Sixth Circuit in an effort to overturn the Sixth Circuit's decision in *Lindsey I*. This Court denied the Petitioner's petition.

B. *Lindsey II*

Upon remand of *Lindsey I*, on July 30, 1996, the District Court abstained from adjudicating each and every Implant Claim pursuant to 28 U.S.C. § 1334(c)(1) and (2), (R.549, Order), without conducting the case by case analysis required under *Lindsey I*. 86 F.3d at 497. Specifically, Judge Hood abstained from *all* Implant Claims pending in state and fed-

eral courts, regardless of whether the plaintiffs in those actions had filed timely motions for abstention and regardless of whether the actions could have been commenced in a federal court absent jurisdiction under 28 U.S.C. § 1334. Having erroneously concluded that abstention was appropriate, the District Court prevented the transfer of Implant Claims that the Sixth Circuit in *Lindsey I* previously had found to be related to the DCC bankruptcy case.

DCC and the Nondebtor Codefendants sought review of the District Court's decision to abstain by the Sixth Circuit by both appeal and a petition for a writ of mandamus under 28 U.S.C. § 1651(a). The Sixth Circuit found that it had mandamus jurisdiction to review the District Court Order for the purpose of enforcing the court's prior mandate in *Lindsey I*, and ordered the District Court to transfer the claims against the Shareholders, Dow Chemical and Corning, to the District Court. The Sixth Circuit instructed the District Court to, upon completion of transfer, index and cross reference the cases "so that, in any proceeding in which a motion for abstention is filed, the district court may make the required abstention determinations and adequately state its reasoning as to each such proceeding." (Tort Comm. Pet. App., 12a). The Sixth Circuit declined, at that time, to extend its holding to the Nondebtor Codefendants other than the Shareholders. *Id.*

By order dated May 13, 1997, the District Court ordered the transfer of all Implant Claims against the Shareholders, whether pending in state or federal courts or later commenced, to the Eastern District of Michigan. On August 1, 1997, Judge Hood issued her first Case Management Order with respect to the Implant Claims against the Shareholders.

REASONS FOR DENYING THE WRIT

The procedural posture of the decision below weighs heavily against the Petitioner's request for a writ of certiorari. The questions presented are not ripe for review at this time

because the District Court has not decided whether to abstain from exercising its subject matter jurisdiction over each Implant Claim against the Shareholders. As a result, there is no controversy for the Court to resolve.

Moreover, the Petitioner has failed to demonstrate any compelling reason that would warrant this Court's review. While the issues are of importance to the parties to the proceeding, they are of minimal importance to the development of the law. The Petitioner has not demonstrated the existence of a conflict of decisions among the courts of appeals. Based on well-settled law, the Sixth Circuit had appellate jurisdiction and mandamus jurisdiction to review the District Court Order.

Finally, the Petitioner has failed to demonstrate that the Sixth Circuit misapplied 28 U.S.C. § 157(b)(5) by ruling that the District Court had the power to fix venue for trial of the Implant Claims against the Nondebtor Codefendants. Indeed, 3M respectfully submits that the Sixth Circuit should have done more than just transferring the Implant Claims pending against the Shareholders. The Sixth Circuit should have ordered the transfer of all Implant Claims against 3M and other Nondebtor Manufacturers, and centralized all Implant Claims in one forum so that they may be resolved in the efficient and orderly manner as contemplated under the provisions of § 1334.

I. THE PROCEDURAL POSTURE OF THE INTERLOCUTORY DECISION BELOW RENDERS THE ISSUES UNRIPE FOR REVIEW AT THIS TIME

The decision to grant certiorari "represents a commitment of scarce judicial resources." *City of Okla. City v. Tuttle*, 471 U.S. 808, 816 (1985). In this regard, the ripeness doctrine prevents the courts, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967). It is a principle of timing in which the Court must look at the situation at the present time rather than at the time of the

decision below. *Anderson v. Green*, 115 S. Ct. 1059, 1060 (1995) (citing *Blanchette v. Connecticut Gen. Ins. Corp. (Regional Rail Reorganization Act Cases)*, 419 U.S. 102, 140 (1974)). The doctrine is often used where future events may affect the justiciable nature of a controversy, making it more apt for review at a later date. *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985). Thus, an action must be sufficiently mature so that it is considered an actual case or controversy as required by Article III of the United States Constitution. U.S. Const. art. III, § 2, cl. 1; *see also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) ("ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction").

Although the Court has jurisdiction to review interlocutory judgments of federal courts of appeals, *see* 28 U.S.C. § 1254(1), the Court will generally not exercise its jurisdiction before a final judgment is issued in the lower courts. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree"); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

The Court has frequently determined that issues remanded by courts of appeals were unfit for review pending final judgment and subsequent court of appeals review. For example, in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), the Court denied certiorari to review a decision of the court of appeals which remanded the case to the district court for the determination of an appropriate remedial course in the matter under review. *Id.* In refusing to grant the writ, the Court stated "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Id.*[3]

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[3] *See also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this

Consistent with these authorities, the questions presented in the Petition are not ripe for Supreme Court resolution because the District Court has not made its final abstention determinations. In accordance with the directive of the Sixth Circuit, the District Court must index and cross reference the Implant Claims. Then, and only then, in any proceeding in which an abstention motion has been filed, can the District Court make abstention determinations containing adequate statements of its reasoning with respect to each determination. The issues of review of abstention determinations and the power to transfer claims against nondebtors pursuant to 28 U.S.C. § 157(b)(5) will not be appropriate for certiorari review until it is clear that claims will be transferred and adjudicated by the Eastern District of Michigan.

Accordingly, because the future effect of the decision below remains speculative in light of the actions yet to be taken by the District Court, the Court should deny certiorari as the questions presented are not ripe for review at this time.

II. THE PETITION FAILS TO DEMONSTRATE ANY COMPELLING REASON FOR THE COURT TO EXERCISE ITS DISCRETION TO GRANT CERTIORARI

The Court's review on a writ of certiorari is purely a matter of judicial discretion that is exercised "only for compelling reasons." Sup. Ct. R. 10. A petition for certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Rather, the jurisdiction of the Court is "exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Court."); *cf. Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (Court initially denied certiorari where court of appeals remanded case until subsequent rulings were issued by district court and court of appeals).

As the Court has observed, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *see United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975) ("In the absence of . . . an indication that the issues are of sufficient general importance to justify the grant of certiorari we decline to entertain them.").

Here, the errors asserted by the petitioner present no "compelling reasons" for review by the Court. First, the Petitioner's assertion that the Sixth Circuit's use of mandamus was unprecedented is patently without merit. As explained below, the Sixth Circuit had clear authority to review the District Court Order. Second, there is no conflict between the circuits over an unsettled federal question of public importance. As is further explained below, the Sixth Circuit properly applied 28 U.S.C. §§ 157 and 1334, and did so in a manner that is wholly consistent with the only other circuit court decision that is directly on point. Accordingly, even if review at this time were not barred by the ripeness doctrine, the Petition should nevertheless be denied.

A. The Sixth Circuit Properly Asserted Mandamus Jurisdiction to Review the District Court Order

In an effort to obtain review by the Court, the Petitioner has mischaracterized the Sixth Circuit's decision as an "unprecedented use of mandamus," (Pet. at 13) which "amount[s] to effective nullification of the statutory bar." (Pet. at 7). In actuality, however, the Sixth Circuit had clear authority under well-settled and long-standing principles of law to assert mandamus jurisdiction to review the District Court Order.

1. Appellate Jurisdiction was Retained When the Sixth Circuit Remanded the Abstention Issue

As discussed above, the issue of abstention was properly before the Sixth Circuit, and no party in *Lindsey I*, including the Petitioner, questioned the Sixth Circuit's jurisdiction to review the District Court's rulings on the issue of abstention. And, in remanding this matter for further proceedings because the District Court failed to consider the abstention issue "in detail", the Sixth Circuit did not authorize the District Court to ignore the directives set forth in the *Lindsey I* mandate, and did not deprive itself of jurisdiction to consider the actions of the District Court on remand. Indeed, the Court retained plenary power to review the District Court Order after remand to determine whether or not the Court's mandate had been properly carried out, regardless of the appellate bar language of § 1334(d).

In refusing to address the abstention issue "in the first instance," the Sixth Circuit followed well-settled principles of appellate jurisprudence that: (1) an appellate court should not consider an issue on appeal in the first instance, and (2) that both judicial economy and efficiency are served if the lower court is given an opportunity to fully develop a record before the issue is reviewed on appeal. *See Super X Drugs Corp. v. Federal Deposit Ins. Corp.*, 862 F.2d 1252, 1256 (6th Cir. 1988) ("We believe that in the interest of justice in this case the district court should indicate and clarify the basis of its determination."); *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 793 (6th Cir. 1984) ("This Court . . . concludes that the failure of the trial court to make a specific finding as to the question of agency requires that the matter be remanded for clarification and/or further consideration of the agency issue."); *Belcon, Inc. v. Sherman Constr. Co.*, 800 F.2d 1321 (4th Cir. 1986) (declining to consider the district court's rulings on appeal in light of the sparse findings of fact by the district court).

Accordingly, the Sixth Circuit properly remanded the issue of abstention, which was properly before it in *Lindsey I*, so that a fuller record may be developed. And, in so doing, the Sixth Circuit retained the plenary power to ensure that the District Court complied with the Sixth Circuit's mandate.

2. The Sixth Circuit had Mandamus Jurisdiction Under the All Writs Act.

The jurisdictional authority to issue a writ of mandamus is provided by 28 U.S.C. § 1651(a), which states in part, "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

When an appellate level court remands a case to the trial level court, the lower court must follow and implement the appellate court's mandate. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 71 F.3d 1197, 1201 (6th Cir. 1995) ("The customary procedure on remand creates a duty on the part of lower courts, which obtain jurisdiction after receiving the mandate of an appellate court, to obey the terms of the mandate and to carry it into effect."); *Kidder, Peabody & Co., Inc. v. Maxus Energy Corp. (In re Ivan F. Boesky Securities Litigation)*, 957 F.2d 65, 69 (2d Cir. 1992) ("The district court's actions on remand should not be inconsistent with either the express terms or the *spirit* of the mandate.") (Emphasis added).

Where the lower court fails to abide by the appellate court's prior mandate, the appellate court retains the plenary power to require compliance with its mandate. And, this plenary power extends to review orders that are not otherwise reviewable on appeal. *See United States v. E.I. Du Pont De Nemours & Co.*, 366 U.S. 316, 325 (1961) ("We have plenary power to determine whether our judgment was scrupulously and fully carried out."); *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990) ("If the district court fails to comply with an appellate mandate, the appellate court has authority to

review the district court's actions and order it to comply with the original mandate.").[4]

The foregoing provides clear authority to the Sixth Circuit to review the District Court Order, because the District Court failed to carry out the mandate of the Sixth Circuit.[5] Instead of undertaking the requisite analysis " 'in each individual case' " to determine if abstention would " 'promote or impair efficient and fair adjudication' " of the bankruptcy, the District Court abstained from *all* Implant Actions based upon a perfunctory and inaccurate appraisal of the actions as a generic whole. The District Court's failure to carry out the terms and spirit of the mandate provided a jurisdictional basis for review.

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[4] In exercising the authority to ensure that its mandate is properly carried out, the appellate court may review the lower court's order either through another appeal or by writ of mandamus. *See Baltimore & O.R. Co. v. United States*, 279 U.S. 781, 785 (1929) (lower court's "action may be controlled by this court, either upon a new appeal or by writ of mandamus"); *Continental Ins. Co. v. United States*, 259 U.S. 156, 166 (1922)(court has plenary power to determine whether the lower court complied with the court's mandate where "the decree in any proper way is brought to our attention"); *In re General Motors Corp.*, 3 F.3d 980, 983 (6th Cir. 1993) ("Under [the All Writs Act], the courts of appeals have the authority to, inter alia, issue writs of mandamus to district courts to ensure compliance with earlier mandates."); *Carroll v. Blinken*, 42 F.3d 122, 126 (2d Cir. 1994) ("we review de novo whether the judgment comports with our mandate in Carroll I, considering each of appellants' objections in turn.").

[5] It is well settled that a court of appeals' mandate encompasses the directives contained in the court's opinion. Fed. R. App. P. 41(a) ("A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue."); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 71 F.3d 1197, 1200 n.3 (6th Cir. 1995) (mandate consists of, *inter alia*, judgment and opinion); *United States v. Reyes*, 49 F.3d 63, 66 (2d Cir. 1995) (mandate consists of court's judgment and opinion). Thus, the Sixth Circuit's mandate includes its June 3, 1996 opinion.

3. Petitioner's Reliance on the Appellate Bar Language in Section 1334(d) is Misguided

Against this backdrop, the Petitioner incorrectly relies on the appellate bar language contained in section 1334(d) to suggest that the Sixth Circuit lacked mandamus jurisdiction to review the District Court Order. The Petitioner is mistaken. Courts have on numerous occasions granted mandamus petitions to vacate otherwise nonappealable remand orders and abstention determinations issued by district courts that incorrectly refused to exercise jurisdiction. *See, e.g, In re Burns & Wilcox, Ltd.*, 54 F.3d 475, 478 (8th Cir. 1995) (overturning order abstaining from exercising jurisdiction); *In re General Motors Corp.*, 3 F.3d 980, 983 (6th Cir. 1993) (issuing a writ of mandamus to vacate a remand order where the district court erred in determining that certain state law claims were not preempted by federal law); *Beard v. Carrollton R.R.*, 893 F.2d 117, 118 (6th Cir. 1989) (vacating remand order by writ of mandamus where basis for remand was unfounded).

While section 1334(d) does preclude appeals of abstention orders, the statute on its face does not bar mandamus review of such orders. Specifically, section 1334(d) provides that an abstention decision is not reviewable by "appeal or otherwise under sections 158(d), 1291 [and] 1292 . . . ." Each of these sections referenced in the statute involves appeals only, and none relates to mandamus petitions. Clearly, if Congress had sought to preclude review of abstention orders under § 1334 by writ of mandamus, it would have so stated.

Indeed, 28 U.S.C. § 1447(d) does not contain the qualifying language contained in § 1334(d), and consequently, § 1447(d) has been interpreted as precluding mandamus review of a remand order subject to that section. *See Thermtron*, 423 U.S. at 343 (section 1447(d) "prohibits review of all remand orders issued pursuant to § 1447(c) . . . whether review is sought by appeal or by extraordinary writ.").

Thus, contrary to Petitioner's assertion, the Sixth Circuit has not enlarged its appellate jurisdiction, but appropriately exercised its authority in mandamus to enforce its mandate.[6]

B. The Sixth Circuit Correctly Interpreted and Applied 28 U.S.C. § 157(b)(5)

The argument that the Sixth Circuit misinterpreted 28 U.S.C. § 157(b)(5) is equally without merit, providing no alternative basis for the Court to grant the writ. A necessary condition to implementing the reorganization policy underlying the bankruptcy laws is the centralization, to the maximum extent permitted by the United States Constitution, of all of the debtor's assets, as well as a process for dealing with all of the debtor's liabilities.[7] Consistent with congressional

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[6] Two other grounds exist for appellate jurisdiction, although the Sixth Circuit did not base its analysis on them. First, the appellate bar language of § 1334(d) does not apply if the statutory conditions contained in section 1334(c)(2) are not satisfied. *See In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702, 708 (2d Cir. 1995) (where the statutory prerequisites to mandatory abstention had not been satisfied, the district court should not have even conducted a mandatory abstention analysis). Here, the Implant Claims should not have even been subject to the mandatory abstention analysis since two critical requirements of § 1334(c)(2) have not been satisfied: (1) the vast majority of the plaintiffs in those claims failed to file a motion, and (2) each of the Implant Claims could have been commenced in federal court based on federal diversity jurisdiction.

Second, appellate review of the District Court Order exists by pendent appellate jurisdiction because portions of the District Court Order are appealable. The District Court abstained from claims even though no timely motion had been filed and there was an independent basis for federal jurisdiction. Moreover, the District Court misapplied the statutory exemption under 28 U.S.C.§ 157(b)(4). Thus, even if the District Court properly abstained from transferring some of the Implant Claims, those claims are appealable because they are inextricably intertwined with the Implant Claims that the District Court improperly refused to transfer. *Brennan v. Township of Northville*, 78 F.3d 1152, 1157 (6th Cir. 1996) ("pendent appellate jurisdiction [appropriate] where the appealable and non-appealable issues are 'inextricably intertwined'") (citing *Swint v. Chambers County Comm'n*, 514 U.S. 35, 115 S. Ct. 1203, 1212 (1995)).

[7] Congress has provided the bankruptcy courts with powerful tools in order to accomplish these goals. *See, e.g.*, 28 U.S.C. § 1334(e)

intent and the provisions of the Bankruptcy Code, the Sixth Circuit properly construed § 157(b)(5) to permit centralization of claims against nondebtors in cases where the failure to centralize would harm the debtor's prospects of reorganization. *See A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 1011 (4th Cir. 1985) (congressional purpose of § 157(b)(5) was to "centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case' ") (quoting 130 Cong. Rec. H7492 (daily ed. June 29, 1984) (statement of Rep. Kastenmeier)), *cert. denied*, 479 U.S. 876 (1986).

Against this backdrop, Petitioner's contention that § 157(b)(5) can never authorize the transfer of claims against nondebtors, is wholly without merit. Indeed, the Petitioner does not cite a single authority to the contrary.

Section 157(b)(5) applies to "personal injury tort and wrongful death claims." It does not contain *any* limitations. Petitioner's argument that Congress must have meant personal injury or wrongful death claims against the estate because a different section (§ 157(b)(2)(B)) does refer to claims against the estate, is completely without merit.

As discussed, *supra*, this Court has held that 28 U.S.C. § 1334(b) applies not only to actions against debtors, but also to actions against nondebtors. *See Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1498-99 n.5 (1995) (proceedings "related to" bankruptcy include "suits between third parties which have an effect on the bankruptcy estate"). It follows, then, that other provisions of title 28 of the United States Code which are related to § 1334(b) should be interpreted in a consistent manner with that section. As this Court has stated, statutory construction is

> a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the

(exclusive jurisdiction of district court over all debtor's property wherever located); 11 U.S.C. § 541(a) (creation of estate comprised of property wherever located); 11 U.S.C. § 105(a) (nationwide service of process).

> statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 369 (1988).

Moreover, the Implant Claims against the Nondebtor Codefendants are, in effect, claims against DCC. As discussed, *supra*, the claims against DCC are inextricably intertwined with the claims against respondent and the other Nondebtor Codefendants because plaintiffs have sued DCC and the Nondebtor Codefendants jointly and severally. *Cf. American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14 (1951) ("where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action"). As the decision below held, the nature of the Implant Claims establishes that DCC and the Nondebtor Codefendants are "closely related" with respect to the implant litigation. *See also A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 999 (4th Cir. 1985) (the unusual situation permitting § 362 to apply to nondebtors is the existence of "such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor"), *cert. denied*, 479 U.S. 876 (1986).

The Sixth Circuit's conclusion that § 157(b)(5) applies to claims against debtors as well as nondebtors is directly supported by the only circuit court of appeals decision directly on point—the *Robins* decision. Prior to the filing of its chapter 11 case, Robins was faced with five thousand Dalkon Shield actions filed in state and federal courts throughout the United States. *Id.* at 996. Over half of such actions named the debtor as the sole defendant, while the remainder named as defen-

dants both debtor and nondebtor parties, including the debtor's insurance company, hospitals, and physicians. The district judge granted the debtor's motion pursuant to § 157(b)(5) to transfer all five thousand actions, including those against nondebtor defendants, to the district court in which the bankruptcy case was pending. The scope of the order was very clear and explicitly transferred claims against nondebtor codefendants:

> ORDERED, pursuant to Sections 157(b)(5) and 1334(b) of Title 28 of the United States Code, that to the extent personal injury tort or wrongful death actions against Robins *or any other defendant* that are related to the Robins Chapter 11 case are to be tried in a district court, such action shall be tried in the Richmond Division of the United States District Court for the Eastern District of Virginia; and it is further
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> ORDERED, pursuant to Section 1334(b) of Title 28 of the United States Code, that *all actions based upon personal injury tort or wrongful death claims* arising from the use of the Dalkon Shield intrauterine contraceptive device are proceedings related to this Chapter 11 case over which this Court has jurisdiction; and it is further
>
> ORDERED that *all actions* related to the Robins Chapter 11 case, as determined by this Order, now pending in any federal district court or subsequently removed to any federal district court during the pendency of this Chapter 11 case, be transferred by the Clerks of those Courts to this Court . . . .

In re A.H. Robins Co., No. 85-01307-R (E.D. Va. Nov. 9, 1985) (emphasis added).

On appeal, the Fourth Circuit confirmed the consolidation in the district court of all Dalkon Shield claims commenced against both the debtor and nondebtors:

> [T]here are very real considerations that support a centralization of *all* the Dalkon Shield claims, at least at

> first, in the district court having jurisdiction of the bankruptcy. The "single focal point" of this proceeding is the development of a reasonable plan of reorganization for the debtor, one which will work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the Dalkon Shield claims.

Robins, 788 F.2d at 1011 (emphasis added). *See also Murray v. Pan Am. World Airways, Inc. (In re Pan Am Corp.)*, 16 F.3d 513 (2d Cir. 1994) (§ 157(b)(5) applied to transfer of wrongful death lawsuits naming two Pan Am debtors and one nondebtor Pan Am affiliate).

Petitioner argues that the *Robins* decision should be ignored because no transfer of claims actually occurred. What Petitioner fails to state, however, is that after the Fourth Circuit concluded that centralization would be the rule, the parties reached a settlement in connection with a plan of reorganization. *See In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.) (approving settlement), *cert. denied sub nom., Anderson v. Aetna Cas. & Surety Co.*, 493 U.S. 959 (1989). The fact that the physical transfer of claims under § 157(b)(5) was rendered unnecessary as a result of the settlement has absolutely no bearing on the correctness or ultimate efficacy of the Fourth Circuit's decision. Indeed, because the Sixth Circuit's decision below is entirely consistent with the Fourth Circuit's decision in *Robins*, Petitioner has failed to demonstrate the existence of a circuit split regarding the interpretation of § 157(b)(5), which is a further reason for the Court to deny the Petition.

Accordingly, because the decision below interpreted the court's mandamus jurisdiction and sections 1334(d) and 157(b)(5) correctly, and does not conflict with the decision of any other court of appeals, the Court should deny Petitioner's request for certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied.

Respectfully submitted,

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